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Alfred T. Rich & Shirley T. Rich v. Robert B. McGovern & Sheila J. McGovern: Brief of Respondent

Utah Supreme Court

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JAMES R. BROWN; ATTORNEY FOR APPELLANTS.

IN THE SUPREME COURT

OF THE STATE OF UTAH

ALFRED T. RICH and SHIRLEY T. RICH, Plaintiffs-Appellants, vs. ROBERT B. McGOVERN and SHEILA J. McGOVERN, Defendants-Respondents.	No. 14401

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

Respondents concur with appellants' statement.

DISPOSITION BELOW

Respondents concur with appellants' statement.

RELIEF SOUGHT

Respondents seek affirmance of the summary judgment.

STATEMENT OF FACTS

Respondents cannot concur in appellants' statement of facts.

Respondents recognize that on appeal from a summary judgment the facts should be viewed in a light favorable to the losing party, but still the facts to be considered on review must be limited to those that were before the trial court. Appellants' brief raises facts and issues of facts which were not.

At pages 3 and 4 of their brief on appeal, appellants claim seven areas of misrepresentation. Only two of the seven are mentioned in any pleadings filed by appellants prior to this appeal. Those two claims are that the value of the rental equipment was overstated, and that the monthly gross income of the business was not $8,500.

These two claims are stated at paragraphs 3, 4, 6 and 7 of their complaint. (R1, 2)

While appellants touched on other matters in their depositions, they did not plead them, but stood on their original complaint as being their only pleading prior to this appeal.

One of these two representations has changed form between complaint and appeal. This is the representation of gross monthly income of $8,500. Relative to this, the complaint says

> "7. That contrary to the representations relative to Exhibit "C" about the sales in each month that the sales do not equal the figures as indicated and represented and guaranteed in said representations but that defendants and each of them knew that the business was not represented and warranted . . ." (R2).

This language has to be compared with the comparable matter as stated by appellants on appeal which was:

> "5. The monthly gross sales guarantee of $8,500 was not realized." (Underlining added) (Appellants Brief on Appeal, page 3)

Respondents regret going into this matter in the Statement of facts. It is necessary in order to define the factual issues before the court.

The brief on appeal of appellants apparently abandons the contention in the complaint that respondents' gross monthly sales were overstated at $8,500.

The portion of the complaint talking about a guaranteed future income, after the parties' contract, has been retained.

The trial court specifically stated as being the only issues before it: (R62)

> "Plaintiffs' claim misrepresentation as to the business valuation, and further as to the gross monthly income."

Accordingly, respondents, in their Statement of Facts will confine themselves to the two aforesaid issues of whether there was a guarantee of future income to the sellers of $8,500 per month, and whether the value of the business was misrepresented.

Going first to the matter of the guarantee of future income, appellants' complaint states that appellants relied on respondents' written representations. These representations are attached to their complaint as Exhibit "C". (Representation of Income - R8)

Respondent concedes he made the written statement. He claims it to be true.

Appellant, Mr. Rich, in his deposition, admitted he knew what the actual earning history was.

> "Q. Did you ever look at the monthly statements?
>
> "A. Yes, Bob called me into his office and we went over the books for an approximate period of 22 months to get an average of what the business was pulling in." (R98, L15 - 23)

In regard to the future claimed income guarantee, while this is somewhat different than a representation of an existing fact, still Mr. Rich was questioned in his deposition as to what his understanding was in regard to it.

> "Q. This business of guaranteeing gross monthly sales of $8500, that wasn't put into the contract, was it?
>
> "A. No.
>
> "Q. You didn't require that the guarantee be a contract term, did you?
>
> "A. Excuse me?
>
> "Q. You didn't require that that be a contract term, did you?
>
> "A. I guess not." (R124, L11 - 19)

To make sure of clarity in this regard, the matter was touched on again in Mr. Rich's deposition and Mr. Rich admitted as follows:

> "Q. Now, before the contract was signed, did you ask anything about having the contract include a guarantee on this $8500 a month?
>
> "A. I don't believe so.
>
> "Q. Do you recall Mr. McGovern talking about that and saying that if he worked with a new owner for a period of time, if he had control he might guarantee $8500?
>
> "A. Excuse me?
>
> "Q. That Mr. McGovern would have to be there on the premises to guarantee $8500?
>
> "A. I don't remember.

"Q. There was no way he would know what kind of control a new owner would pull in and what kind of money they would make, you know, if it weren't managed right, would he?

"A. I guess.

"Q. Have you ever asked Mr. McGovern to honor any kind of guarantee of any kind?

"A. I don't recall.

"Q. It is really not a part of the deal between you, is it?

"MR. BROWN: Well ---

"MR. KING: As you understand it.

"THE WITNESS: The contract?

"Q. (By Mr. King) The $8500 a month.

"A. I guess not." (R138, L16 - R139, L16)

In regard to the other matter, misrepresentation as to the value of the business, Mr. McGovern filed an affidavit supporting his motion for summary judgment (R43 - 46) which explained in detail how he arrived at the business valuations. Plaintiff filed no opposing affidavit. In sum, Mr. McGovern said the value of the business is not in the value of the equipment. The equipment standing in the shop has only an investment value, as it is not producing income. Its value lies in the equipment being out in rental locations. He stated that the actual cost of the softener tank is $30. Freight and resin add about $32 more. There are other costs such as advertising, overhead and installation bringing the total investment to get

a unit on location to about $170.

The tank then nets $6 per month in rental. Charging half of this to cost of servicing, leaves net income of $3 per month, or $36 per year, for the average tank. The tank has a life expectancy of 20 years, giving a net return of $720 over 20 years. He rated the tanks' value on this basis, not on a cost basis.

In sum, respondent, in his affidavit, admitted his claimed allegation of "estimated value" but explained exactly how he arrived at it and stood behind the "estimated values" as being accurate.

Mr. McGovern's affidavit corresponded in figures and amounts with his written representation (R10).

Appellants raise no issue that Mr. McGovern misstated the total number of units he had in the shop and on location.

> "Q. Did you ever ask Mr. McGovern how many softeners he had?
>
> "A. In stock for sale?
>
> "Q. In stock for sale, out on lease, whatever.
>
> "A. Yes, I made an inventory myself.
>
> "Q. That was before the sale?
>
> "A. Yes." (R101, L24 - R102, L5)
>
> "Q. All right. And he went over with you briefly the 485 exchange rental locations. What is an exchange rental location? What did he tell you?

"A. He said he had a rental exchange tank in somebody's home and he had them in 485 homes.

"Q. All right. And is that figure an accurate figure from what you found out since being in the business?

"A. Yes. It seems pretty accurate." (R103, L1 - 8)

Appellants annexed to their complaint as Exhibit "E" (R11), a "inventory sheet" in which they itemized and valued the equipment at roughly half what respondent claimed for it in his written affidavit (R10). However, these two exhibits talk about different things. Mr. McGovern's written representation was titled, "Estimated Values". Previously explained, a value is different than a cost because of the income producing potential of the equipment. Appellants' Exhibit is titled "Inventory Sheet", and at the bottom it states, "All prices are based upon cost as of 1974 if bought brand new!"

Alfred Rich was questioned in his deposition as what he understood the meanings of Mr. McGovern's phrase, "Estimated Value" to be.

"Q. When you talked to him, you got down to these estimated values, didn't you?

"A. We went over them, I believe.

"Q. Okay. Tell me what he told you about them?

"A. He told me what they were worth." (R104, L24 - R105, L

"Q. Okay, now tell me what your conversation was of the estimated values, rental automatics, $45,000. What about the conversation you had with Mr. McGovern?

"A. Basically all it amount to is he said this is what the equipment was worth." (R105, L21 - 25)

Mr. Rich was asked further questions along this line for additional clarity.

"Q. Do you remember sitting down with Mr. McGovern one afternoon before the sale and you said something like, 'What is the business worth? How do we arrive at the sale terms?' And he explained to you how he arrived at these estimated values?

"A. No.

"Q. Well, you were just talking about going through Exhibit D-2 with him. Now, when you got to estimated values, he told you how he arrived at values on these things, didn't he?

"A. No, not that I remember.

"Q. Do you remember him going through, 'Here is how I make my rating,' similar to this Exhibit D-3 that he has written down?

"A. No.

"Q. Never at all?

"A. No.

"Q. But these are values. It says, 'Estimated Values,' not costs. Did he ever tell you what the cost per unit was?

"A. No.

"Q. Did you ever ask him?

"A. I don't remember. (R106, L25, R107, L1 - 22)

Respondents' counsel was still concerned because of the reference to "cost" and appellants' exhibit which he had prepared and which he attached to his complaint. Accordingly,

Mr. Rich was questioned specifically as to "cost".

"Q. (By Mr. King) Did you specifically understand that the estimated value on the units, like $45,000 on rental automatics, that that represented the cost of acquisition of those things?

"A. What do you mean by cost of acquisition?

"Q. How much it cost Mr. McGovern to buy them and have them installed.

"A. He said that, 'This is what these pieces of equipment are worth.'

"Q. Right. Are worth. Now, this was explained to you by Mr. McGovern as being this is what they are worth?

"A. No.

"Q. As a part of the business?

"A. No.

"Q. Okay. Then did he say it was their cost?

"A. Yes. He said, 'This is what they are worth in cost.' He never went into any formula saying how be based this Well, I was buying an account with it. He said this is what the equipment cost.

"Q. I see. Did you ask him then how much it had been depreciated; what its present value was?

"A. No, I didn't.

"Q. You are familiar with depreciation generally, aren't you?

"A. No, I wasn't at the time and I am still not completely familiar.

"Q. You know if you buy a car it wears out.

"A. Yes.

"Q. This is depreciation.

"A. Yes.

"Q. If this is the cost of these things, what were they worth at the time of the sale? Did you ask him that?

"A. No, I didn't. I don't recall. He said that, 'These are what the cost of the equipment is.'

"Q. And how old did he say the equipment was?

"A. He didn't.

"Q. What did you ask him about that?

"A. He said that this was equipment that he had picked up over the years, he had started out with, that he had picked up during the process of the years.

"Q. Okay. Now, the tanks have a limited life expectancy, don't they?

"A. I believe so.

"Q. And the resin has a limited life expectancy?

"A. Yes.

"Q. You wouldn't buy a used car for the new price, would you?

"A. No.

"Q. Okay. Now, what was the conversation about, 'Well, what are these things worth today then?'

"A. We didn't have a conversation that way, I don't believe.

"Q. You never asked about it?

"A. I don't recall." (R117, L25 - R120, L3)

In regard to appellant, Shirley Rich, in her deposition, she admitted that the McGoverns were strangers to her (R183, L17 - 18), and that she herself made no efforts of any kind to investigate whatever representations the McGoverns had made (R183, L18 - 20; R187, L18 - 20; R188, L3 - 8).

ARGUMENT

I.

APPELLANTS SHOULD BE LIMITED ON APPELLATE REVIEW TO THE MATTERS PRESENTED TO THE TRIAL COURT.

In appellants' depositions, they mention areas of claimed misrepresentation which are set forth in the Statement of Facts in their brief on appeal. However, these matters simply were not plead anywhere at the trial level.

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." R 9(b) URCP. Davis Stock Co. v. Hill, 2 U2d 20, 268 P2d 988. Pace et al. v. Parrish, et al., 122 U 141, 247 P2d 273.

Plaintiffs complaint states (paragraph 6, R2) that their inventory of the property, as per their annexed Exhibit "E" (R11), shows that respondents overvalued the business.

Paragraph 7 of the complaint referring to monthly gross sales states, ". . . the sales do not indicate the figures as indicated. . .," without further detail as to how the representation is inaccurate.

These are the only specific allegations that appellants have made.

There is simply no detailing at all in the complaint of reliance on verbal representations, undue pressure to buy, business indebtedness, timeliness of accounts payable, value of accounts payable or company money losses, which are the other claims of appellants in their brief on appeal.

Respondents in their Answer stated as their first defense that the complaint failed to state a cause of action upon which relief could be granted.

The effect of the affidavit of Mr. McGovern (R43 - 46) was to pierce the allegations of the complaint regarding valuation of the company. He stated that his representation was based on both the cost of the equipment and its income producing potential. As plaintiffs' inventory annexed to their complaint specifically related only to replacement cost as of 1974 (R11), it did not meet the "value issue".

What position is a party in when he claims fraud, the opposing party admit the claimed representations, but claims them to be proved true and explains exactly his basis for

making them, and the complaining party does not rebut?

This question can be considered on two points:

First, the pleading requirements imposed on a party responding to a motion for summary judgment, and,

Second, the obligation of a party to raise matters before the trial court in order to preserve them as issues on appeal.

"RULE 56. SUMMARY JUDGMENT.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters

stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(c),(e), URCP.

Appellants did raise in their despositions issues of company debt and selling pressure. However, that would not put those matters before the court, as they were not plead originally, and appellants never moved to amend their complaint to state them. While depositions have evidentiary value, they are not pleadings, and do not frame issues.

Probably the closest Utah case is Dupler v. Yates, 10 U2d 251, 351 P2d 624, in that it also involves a plaintiff's appeal from an adverse summary judgment on a fraud case, with depositions being used as part of the defendant's evidentiary basis for his motion, and defendant's affidavits, which pierced

the allegations of the complaint, being substantially unrebutted. There, plaintiffs did file opposing affidavits, but these failed to close with the issues.

The court summarized its holding, 10 U2d 270, as follows:

> "The record made by the defendant, in support of his motion for summary judgment, controverted the unverified allegations in the plaintiff's amended complaint and therefore, in the absence of counter-affidavits, no genuine issues of material fact were created."

In accord see United American Life v. Willey, 21 U2d 279, 444 P2d 755; Walker v. Rocky Mountain Recreation Corp., 29 U2d 274, 508 P2d 538; Rainford v. Rytting, 22 U2d 252, 451 P2d 769.

Going on to the point of raising new matter on appeal, let us assume a party raises issues in his deposition which are not plead. It might be harsh to put the party out of court for that reason. However, depositions do not speak for themselves. Without a pleading, affidavit, memorandum or brief, how is a trial judge to know what portions of depositions are claimed as being causes of action unless he entirely reads the depositions himself, puts himself in the position of counsel for that party and himself frames the issues? That is not his function, but is the duty of the party.

Matters must be brought before the trial court as a condition precedent to their being considered on appeal. Elg v.

Fitzgerald, et al., Utah, filed March 8, 1976, No. 14169: KUTV, Inc., v. Motor Sales, Utah, filed February 10, 1976, No. 13987; Law v. Smith, 34 U 394, 98 P 300; VanLeeuwen v. Huffaker, 78 U 521, 5 P2d 714; 5 AmJur 2d, Appeal & Error, §545, p. 29.

Pettingill v. Perkins, 2 U 2d 266, 272 P2d 185.

"While it was the plaintiff's burden to make his case complete in all respects as regard allegations, proof, and findings, it was likewise the defendant's duty to inform the court if he had any objection or felt himself aggrieved or at a disadvantage on account of any such matters. By not making objection, he waived them."

POINT II.

THE TRIAL COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT ON THE BASIS THAT THERE WAS NO ACTIONABLE MISREPRESENTATION NOR REASONABLE RELIANCE IN THIS CASE AS A MATTER OF LAW.

For clarity, respondents have separated these into three subpoints. These are:

1. Were there any actionable misrepresentations at all?

2. Did appellants rely upon the representations?

3. Assuming, for the purpose of argument, that there were misrepresentations, was appellants' reliance thereon reasonable under the law?

WERE THERE ANY ACTIONABLE MISREPRESENTATIONS AT ALL?

Going first to the matter of the $8,500 gross monthly income, appellants have abandoned, in their brief on appeal, their claim in the complaint that before the sale of the business to them gross monthly income was not $8,500. Alfred Rich admitted in his deposition that he had gone over the income and outlay statements for the previous 22 months before the sale. The figures revealed by these books must have been favorable to respondent as nowhere in his brief on appeal nor in his deposition does he say they are false (R98, L20 - 25; R99, L1 - 5). This leaves the grievance that he has stated in his brief on appeal, that there was a guarantee of future income after he took over the business of $8,500 gross monthly income and that guarantee has not been met.

Is a seller's statement concerning future income that a buyer of a business might receive actionable in a fraud case? The general law in this area is very well settled. A guarantee is not the same as a representation made during negotiations for sale of a business. Appellants state in their brief on appeal that there was a "guarantee". However, the facts, as testified to by Alfred Rich, are diameterically opposed to that claim. He specifically admitted in his deposition there was no guarantee of future monthly income at all.

> "Q. Now, before the contract was signed, did you ask anything about having the contract include a guarantee on this $8,500 a month?

"A. I don't believe so.

"Q. Do you recall Mr. McGovern talking about that and saying that if he worked with the new owner fora peridd of time, if he had control he might guarantee $8500?

"A. Excuse me?

"Q. That McGovern would have to be there on the premises to guarantee $8500?

"A. I don't remember.

"Q. There was no way that he would know what kind of control new owner would pull in and what kind of money they would make, you know, if it weren't managed right, would he?

"A. I guess.

"Q. Have you ever asked Mr. McGovern to honor any kind of guarantee of that kind.

"A. I don't recall.

"Q. It is really not part of the deal between you, is it?

"A. I guess not." (R138, L16 - R139, L16)

From the foregoing, it can be seen that any misrepresentation as to future income is not actionable because it doesn't deal with a specific fact in being, and Alfred Rich admits it was not a guarantee.

On an equitable point, related here, Mr. Rich admitted that Mr. McGovern gave him assistance on request after Mr. Rich took over the business.

"Q. He stayed on for three months, really, didn't he?

"A. No.

"Q. Coming down and helping you out when you wanted him?

"A. Oh, yes, he would come down if I called him up and asked him for some help." (R123, L2 - 7)

Going now to the second area of claimed misrepresentation, that the business was not worth what Mr. McGovern had claimed, how do we close with this issue?

Clearly, Mr. McGovern stated "estimated values", yet appellants don't deal with values at all, but claim lower "replacement costs" (R10, 11). Is the value of home its cost to the builder? Is the value of a vending machine the same sitting in the businessman's store room as it is out on location in a business producing income?

The point is, how can appellants say that respondents estimated values are false unless they use some kind of knowledgeable estimation of values themselves? If they had submitted data showing that the life expectancy of the machines would not average 20 years, that the monthly income did not average $6, or that the monthly cost of servicing did not average $3, then there might be genuine issues of fact. Unfortunately, the record is silent on such documentation by appellants.

Even assuming that "cost" is the criteria, appellants have still failed to meet the issue. Mr. McGovern's affidavit explains how he arrives at a cost of $170 per unit. The softener tank itself costs only $30, with the other costs being freight, advertising, installation, etc.

The total cost per unit, which he could legitimately claim, could well be far beyond the costs as inventoried by appellants, because they simply don't explain what factors they used in arriving at their costs. Had they included all the items that Mr. McGovern included, and which seem to be a conscientious explanation of ultimate costs, their figures might very well be in agreement with his.

The Utah law dealing with these hard to define representations of value has been well expressed in Stuck v. Delta Land and Water, 63 Utah 495, 227 P 796, in quoting from Addison on torts (Wood's edition),

> "Generally statements as to value of property, real or personal, which the purchaser has an opportunity to inspect for himself, and in reference to which, upon reasonable inquiry he could ascertain facts upon which to predicate a fair judgment, are mere expressions of opinion, and however erroneous or false are not actionable."

DID APPELLANTS RELY UPON THE REPRESENTATIONS?

One of the necessary elements of fraud is actual reliance on the alleged misrepresentations.

As summarized in Pace v. Parrish, et al.,122 U 141, 247 P2d 273, states, that the aggrieved party must act reasonably and in ignorance of the falsity of the representation, and did

in fact rely on it.

Appellants have conceded that they did not rely on the $8,500 per month representation because they actual knowledge.

"Q. Did you ever look at the monthly statements?

"A. Yes. Bob called me into his office and we went over the books for an approximate period of about 22 months to get an average of what the business was pulling in." (R98, L20 - 25)

A party can scarcely say that he relied in good faith ignorance on matters where he actually saw the books.

Appellants are in somewhat the same unfortunate position in regard to the valuation of the business. They admit they had been close enough to the books long enough to actually create their own inventory of units and locations, which corresponded with the representation made by Mr. McGovern (R101, L24 - R102, L5; R104, L14 - 17).

The question has to arise as to how, with this kind of access to the books, and the clear use he made of them in actually reconstructing the inventory, Mr. Rich was relying on Mr. McGovern's statements.

"Q. Did you ever ask Mr. McGovern how many softeners he had ?

"A. In stock for sale?

"Q. In stock for sale, out on lease, whatever.

"A. Yes, I made an inventory myself.

"Q. That was before the sale?

"A. Yes." (R101, L24 - 25; R102, L1 - 5)

"Q. Okay. Are all of these figures accurate; the 485 exchange rental, 175 rental automatics, the 1 deionizer? Were these accurate?

"A. They seemed pretty accurate." (R104, L14 - 17)

37 AmJur 2d, Fraud and Deceit, §226 states,

"The law will not permit one to predicate damages upon statements which he does not believe to be true, for if he knows that they are false, it cannot truthfully be said that he is deceived by them. . . . Accordingly, there can be no liability in fraud where the complaining party is, in advance, fully knowledgeable and apprised of those matters as to which the representations are alleged to have deceived him."

37 AmJr 2d, Fraud and Deceit, §230 states,

"If the representee makes an investigation, however, that is free and unhampered, and he learns the truth, or conditions are such that he must obtain the information he desires, or if the facts he seeks to know are as obvious to him as to the representor, and their means of knowledge are equal, he is presumed to rely on his own investigation,

and not on the representation. In such case, he cannot be misled by the representor."

As to the matter of the investigation being free and unhampered, as referred to in the preceding American Jurisprudence citation, Mr. Rich admitted that the books were fully open, both to him, and his expert, Mr. Ott, his father-in-law, who is an accountant and professor.

> "Q. All right. Now, Mr. Ott had agreed to look at the books, hadn't he?
>
> "A. Yes.
>
> "Q. And Mr. McGovern had agreed to let him see them, hadn't he?
>
> "A. No. I don't recall Bob verbally saying to Mr. Ott that he could see the books.
>
> "Q. It was one of the things that was discussed, though, at the time of the earnest money: 'Now that you people are paying some earnest money, I am going to open my books up to you.' That was discussed by Mr. McGovern, wasn't it?
>
> "A. Well, it was put down on the earnest money that we could see the books,yes.
>
> "Q. And he never refused that, did he?
>
> "A. No, I don't believe so." (R117, L1 - 16)

This is argument, and conjecture, but the statement of Alfred Rich that he couldn't recall whether or not Mr. Ott had looked at the books before the sale (R110, L19 - 23) is difficult to understand. If, as appellants contend in their brief on appeal, they were so pressured that they didn't have adequate

time to fully investigate the business, and Mr. Ott had no opportunity to see the books, Mr. Rich would certainly have made this point in his deposition. It would have been a powerful point in his favor. Conversely, if Mr. Ott had examined the books and failed to pick up discrepancies, Mr. Rich would have remembered this because his father-in-law had led him into grief. The remaining inference is that Ott did look at the books, the books were accurate, but Mr. Rich couldn't bring himself to admit it. If so, Mr. Rich clearly relied on the books and his inquiry concerning them.

Mr. Rich's testimony on this point is as follows:

"Q. Let's see. You don't know if before the sale was made whether your father-in-law had looked at the books?

"A. I can't say for sure.

"Q. You never asked him?

"A. I don't recall." (R110, L19 - 23)

ASSUMING, FOR THE PURPOSE OF ARGUMENT, THAT THERE WERE MISREPRESENTATIONS, WAS APPELLANTS' RELIANCE THEREON REASONABLE UNDER THE LAW?

If appellants relied on respondents' representations, were they reasonable in doing so?

The basic duty of inquiry is well stated in Utah cases. For example, in Lewis v. White, 2 U2d 101, 269 P2d 865 (1954), the court dealt with the case in which plaintiffs purchased a motel relying on alleged false representation as to installation, sewage disposal, and income from the property. The court

stated,

> "No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestionably any representations made to them. It is their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate . . ." Supra 104.

Stuck v. Delta Land and Water Company, Supra, at 506, in accord, states,

> "If the plaintiff ought, by reasonable diligence, to have known the truth or falsity of the statements. . .. He cannot by blindly believing what he ought not to have believed, or trusting where he ought not to have trusted, or shutting his eyes where he ought to have kept them open, charge the defendant with the consequences of his folly."

This law is in line with the general authorities. The rule is restated in 37 AmJr 2d, §248,

> "The principle of the right of reliance is closely bound up with the duty on the party of the representee to use some measure of protection and precaution to safeguard his interests. It has been widely stated, as a broad generalization, that the person to whom the false representations have been made is not entitled to relief because of it, if he might have readily ascertained the truth by ordinary care and attention and his failure to do so was a result

of his own negligence."

The factual position of appellants is well summed up by th trial court in its Memorandum Decision.

> "The deposition of the plaintiffs indicate that the plaintiffs had access to all the books and records prior to the time that this deal was consumated, had ample opportunity to check each item of valuation placed on the property by the defendants, and could have ascertained the true value if it was not as represented by defendants.
>
> "As to the income, plaintiffs must remember that, they in this connection, likewise had access to the books and records and could determine with ease what the gross and net income of the defendants was." (R62, 63)

It should be noted that the Memorandum Decision is very careful not to say that there had been any actual false statemer The Decision viewed that as being secondary because of the ove whelming weight of evidence dealing with reliance in view of th open access that appellants had had to the Servisoft books.

There are some areas where Alfred Rich said he wasn't informed. However, his deposition indicates that he didn't inqui on these, and was not impeded nor rushed. For example, he stat in regard to the check registers,

> "Q. Did you ever look at the check registers before the sale was made?

"A. No, I didn't.

"Q. Did you ever ask to?

"A. No." (R98, L15 - 19)

He made no complaint about being rushed or pressured in regard to this. This was clarified by the matter of the check register being requestioned,

"Q. All right. So let's see if we have the check register that was there.

"A. Yes.

"Q. And you can't recall if you asked to see it or not?

"A. Right.

"Q. But, specifically, it was never refused to you?

"A. No." (R99, L14 - 20).

An important factor on reliance, is that the earnest money specifically allowed the right of examination of the company's books and Mr. Rich had an expert, his father-in-law, Mr. Ott, and while inferences can be drawn of various kinds from Mr. Rich's testimony, about what he remembers of what Mr. Ott did, this fact was inescapable: If Alfred Rich was inexperienced at all in business, he had an expert available and the express consent of the sellers to let the expert see the books. If he chose not to use that expert, is any reliance he made reasonable?

To illustrate, if I am buying a business, have a lack of business experience, and ask the seller to let my accountant

see his books and the seller agrees, what complaint do I have of reasonable reliance if I don't use my accountant to do what the seller has allowed him to do?

"Q. . . . As of January 8, Mr. Ott was free to look at the books, is that correct?

"A. Yes.

"Q. And so far as you know, all the books?

"A. I imagine so.

"Q. At any time did he do it?

"A. I don't recall." (R95, L13 - 19)

"Q. Well, you haven't had training in accounting, you haven't had a great deal of business experience. Your father-in-law is an accountant and a professor. Didn't you say, 'Will you take a look at these books and tell me what it is that I am buying; tell me if it is a fair deal Didn't you have a conversation like that with Mr. Ott?

"A. I believe so.

"Q. He had put up $1000 of that earnest money, hadn't he?

"A. Yes.

"Q. He was interested in it?

"A. Yes.

"Q. But as far as you know, he never looked at the books?

"A. I couldn't say for sure." (R109, L12 - R110, L1)

What is the position of appellant Shirley Rich?

What was her relationship to Mr. McGovern? In her depositi she stated,

"Q. Mr. McGovern was a stanger to you, wasn't he?

"A. Yes." (R183, L17 - 18)

She made no inquiry as to whether Mr. Ott or Mr. Rich had looked at the books.

> "Q. Al told you that he had been looking at the books and the records and been working down there, didn't he?
>
> "A. He told me what Bob had said and Bob verified it up at Mr. Ott's house. I don't know whether I asked Al if he had seen the books or not. I really don't." (R185, L16-20)

To make sure she understood the question, the point was recovered.

> "Q. Now, it was January 8th that the earnest money was signed and then it was the 19th that the contract was signed. Now, during that eleven days in between, do you know if Al or Mr. Ott went into the company books to find out everything?
>
> "A. I don't know." (R188, L3 - 8)

In Stuck v. Delta Land and Water, Supra at 506, in quoting Black on Recision and Cancellation, §113, the court says,

> "It is a rule of great antiquity, and supported by a great body of authorities, that a person about to enter into a contract or assume an obligation should exercise reasonable care and prudence in the manner of accepting at their face value representations concerning the subject matter made to him by the opposite party; and, although the representations were false and fraudulent, and he was deceived by them and mislead to his injury, yet he cannot rescind or reputiate his contract on that ground, if it appears that he might have discovered the falsity by mere inspection of

the subject, or by the exercise of reasonable diligence in referring to sources of information which were equally open to him as the other party."

Respondents believe that they come within the rationale of Fox v. Allstate Insurance Company, Supra, at 391,

". . . The moving party has the burden of showing that there is no genuine issue as to a material fact and that he is entitled to judgment as a matter of law, but that when he has made a prima facie showing to this effect, the opposing party cannot defeat a motion for summary judgment and require a trial by a bare contention that an issue of fact exists. He must show that evidence is available which would justify a trial of the issue."

In accord, Bullock v. Deseret Dodge Truck Center, Inc., 11 U 2d, 1, 354 P2d 559. Transamerica Title Insurance Company v. United Resources, Inc., 24 U 2d 346, 471 P2d 165. Dupler v. Yates, 10 U 2d 251, 351 P2d 264.

CONCLUSION

Based on the posture of the case as it was at the time the trial court ruled on it, its ruling was correct, and respon-

dents pray it be affirmed.

Respectfully submitted,

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I hereby certify that I mailed a true and correct copy of the foregoing Defendants-Respondents Brief to James R. Brown, Esquire, Attorney for Plaintiffs-Appellants, 79 South State Street, Suite 700, Salt Lake City, Utah 84111, postage prepaid, this_____day of April, 1976.

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